

EXHIBIT A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

STATE OF MAINE, *et al.*

Plaintiffs,

v.

ANDREW WHEELER, Acting Administrator,
United States Environmental Protection
Agency, *et al.*

Defendants and

PENOBSCOT NATION, *et al.*

Defendants-Intervenors.

Civil Action No. 1:14-cv-264 JDL

**ANSWER OF THE PENOBSCOT NATION
TO SECOND AMENDED COMPLAINT AND COUNTERCLAIM**

ANSWER

The Penobscot Nation (the “Nation”), as intervening Defendant, hereby responds to Plaintiffs’ Second Amended Complaint (EDF 30), through counsel, as follows:

1. The allegations in Paragraph 1 characterize Plaintiffs’ lawsuit and therefore no response is required.
2. The allegations in Paragraph 2 constitute legal conclusions to which no response is required. To the extent a response is required, the Nation denies the remainder of the allegations in Paragraph 2.

3. The allegations in Paragraph 3 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegation.

4. The allegations in Paragraph 4 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations.

5. The allegations in the first sentence of Paragraph 5 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations. With respect to the allegations in the second sentence in Paragraph 5, the Nation admits that Maine initially brought this action in 2014 and that Maine requested from the Court a determination that it had the authority to establish water quality standards (WQS) for Indian territories in Maine and an order requiring an Environmental Protection Agency (EPA) decision on Maine's then outstanding WQS in Indian Waters.

6. The allegations in Paragraph 6 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that EPA issued a letter on February 2, 2015, in which it determined that Maine has the authority to establish WQS for Indian territories in Maine subject to EPA's oversight and authority to approve or disapprove such standards under the Clean Water Act (CWA), and in which EPA disapproved some of Maine's WQS for Indian Waters, including Maine's criteria for human health, based upon the rationale that is set forth in the February 2, 2015 letter, and the materials directly or indirectly relied upon. The Nation denies the remaining allegations in Paragraph 6.

7. The allegations in Paragraph 7 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations.

8. The allegations in Paragraph 8 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the allegation that "EPA's February 2, 2015 letter also suggests that any separate WQS ultimately implemented for Maine's Indian Waters will have a regulatory reach beyond those Indian Waters" is vague and the Nation therefore has insufficient information or knowledge upon which to form a belief as to the truth of the allegation and therefore denies the same. The Nation also denies the remainder of the allegations in Paragraph 8, including, but not limited to, Maine's characterization of EPA's February 2, 2015 decision as having the effect of "irresponsibly disrupt[ing] settled regulatory expectations."

9. The allegations in Paragraph 9 constitute legal conclusions to which no response is required. In addition, Paragraph 9 contains twelve bullets, which violates the requirement in Fed. R. Civ. P. 10(b) that a party must state its claims in numbered paragraphs limited to a single set of circumstances. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

10. The allegations in Paragraph 10 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the Court has subject matter jurisdiction over Maine's claims that are brought under the Administrative Procedure Act, 5 U.S.C. §§ 701-06, solely with respect to EPA final agency actions that are ripe for review, but denies that the Court has subject matter jurisdiction

over Maine's claims that are brought under the CWA citizen suit provision, 33 U.S.C. § 1365(a)(2)¹, and denies that the Declaratory Judgment Act provides an independent basis for subject matter jurisdiction over Maine's claims.

11. The Nation admits that venue is appropriate in this Court.

12. The Nation admits that Maine is a sovereign state within the United States. Any remaining allegation in Paragraph 12 is denied.

13. The Nation denies the allegations in Paragraph 13.

14. The Nation admits that Gina McCarthy is the Administrator of EPA and that she is being sued in her official capacity. The Nation admits that EPA is an agency of the United States and has responsibility and oversight regarding certain federal statutes and regulations dealing with the protection, regulation and control of waters within the United States, including the federal CWA. Plaintiffs' assertion that Administrator McCarthy "oversaw or was responsible for EPA's February 2, 2015, letter and the positions and disapprovals of Maine's WQS contained therein" is vague and also constitutes a legal conclusion to which no response is required. To the extent a response may be deemed to be required for this allegation, the Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and therefore denies same.

15. The Nation admits that H. Curtis Spalding is the EPA Regional Administrator for Region 1 (New England), which includes the State of Maine, and that he is being sued in his official capacity. The Nation admit that Mr. Spalding has certain responsibilities and oversight duties regarding certain federal statutes and regulations dealing with the protection, regulation and control of waters within the United States, including the federal CWA. Plaintiffs' argument that Regional Administrator Spalding "oversaw or was responsible for EPA's February 2, 2015 letter

¹ The Court dismissed Plaintiffs' claim under the Clean Water Act on November 18, 2016. *See* ECF 55.

and the positions and disapprovals of Maine's WQS contained therein" is vague and also constitutes a legal conclusion to which no response is required. To the extent a response may be deemed to be required for this allegation, the Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and therefore denies same.

16. The Nation admits the allegations in Paragraph 16.

17. The Nation admits the allegations in Paragraph 17.

18. The allegations in Paragraph 18 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, those allegations are vague and the Nation therefore denies same.

19. The allegations in Paragraph 19 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, those allegations are vague and the Nation therefore denies same.

20. The allegations in Paragraph 20 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations.

21. The allegations in Paragraph 21 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegation. The Nation also denies that Maine's theory of the case in this action is legally correct.

22. The allegations in Paragraph 22 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language, except the bracketed language, appears in the cited

statute, but the Nation denies the remainder of the allegations and denies that Maine's theory of the case in this action is legally correct.

23. The allegations in Paragraph 23 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, those allegations are vague and the Nation therefore denies same.

24. The allegations in Paragraph 24 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language appears in the cited case, but the Nation denies the remainder of the allegations and denies that Maine's theory of the case is legally correct.

25. The allegations in Paragraph 25 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct but admits that the opinion in *Maine v. Johnson* contains the quoted portion of the referenced Senate Report.

26. The allegations in Paragraph 26 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct but admits the quoted language appears in the referenced statute.

27. The allegations in Paragraph 27 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct, but admits that the quoted language appears in the referenced statute.

28. The allegations in Paragraph 28 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language appears in the referenced sources, but denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

29. The allegations in Paragraph 29 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language is contained in the referenced report, but denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

30. The allegations in Paragraph 30 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

31. The allegations in Paragraph 31 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted, selected excerpts appear in the referenced report, but denies the allegations as stated, denies the excerpted statements support Plaintiffs' allegations in Paragraph 30, and denies that Maine's theory of the case in this action is legally correct.

32. The allegations in Paragraph 32 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted, selected excerpts appear in the referenced report, but denies the allegations as stated, denies the excerpted statements support Plaintiffs' allegations in Paragraph 30, and denies that Maine's theory of the case in this action is legally correct.

33. The allegations in Paragraph 33 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language appears in the cited decision, but denies that it is a complete quote and further denies the allegations in Paragraph 33 as stated and denies that Maine's theory of the case in this action is legally correct.

34. The allegations in Paragraph 34 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

35. The allegations in Paragraph 35 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language appears in the cited decision but otherwise denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

36. The Nation admits that the quoted language appears in the cited transcript. The Nation otherwise denies the allegations in Paragraph 36. The Nation also denies that Maine's theory of the case in this action is legally correct.

37. The Nation admits that the quotation in Paragraph 37, except for the bracketed material that was added by Maine, appears in the cited document, but the Nation denies the remainder of the allegations and denies that Maine's theory of the case in this action is legally correct.

38. The allegations in Paragraph 38 constitute legal conclusions to which no response is required. To the extent that a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations as stated, and denies that Maine's theory of the case in this action is legally correct.

39. The allegations in Paragraph 39 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language appears in the cited opinions, but denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

40. The allegations in Paragraph 40 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits the quoted, selected excerpts appear in the cited opinion, but denies the remainder of the allegations and denies that Maine's theory of the case in this action is legally correct.

41. The allegations in Paragraph 41 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language appears in the cited statutory provision but denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

42. The allegations in Paragraph 42 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the allegations are vague and ambiguous, and therefore the Nation denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

43. The allegations in Paragraph 43 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

44. The allegations in Paragraph 44 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the

Nation denies those allegations and denies that Maine's theory of the case in this action is legally correct.

45. The allegations in Paragraph 45 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language appears in the cited transcript, but denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

46. The allegations in Paragraph 46 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegation as stated and denies that Maine's theory of the case in this action is legally correct, but admits that the selectively quoted language in the parenthetical appears in the cited document.

47. The allegations in Paragraph 47 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits the quoted language in the parenthetical appears in 30 M.R.S. § 6202, but denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

48. The allegations in Paragraph 48 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

49. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and therefore denies same.

50. The allegations in Paragraph 50 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required,

the Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and therefore denies same. The Nation admits the quoted language appears in the cited document, but denies the allegations as stated and denies Maine's theory of the case in this action is legally correct.

51. The allegations in Paragraph 51 are vague, Plaintiffs do not define the terms "deep roots," "chief architect," or "takes seriously," and the Nation is without knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies same.

52. The allegations in Paragraph 52 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the Federal Water Pollution Control Act is commonly known as the CWA, that it was amended in 1972 and thereafter, and that the language quoted in Paragraph 52 appears in the cited provision.

53. The allegations in Paragraph 53 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language appears in the cited provision, except for the bracketed language. The Nation denies the allegations in Paragraph 53 to the extent they are inconsistent with the CWA and denies that Maine's theory of the case in this action is legally correct.

54. The allegations in Paragraph 54 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language appears in the cited provision but avers that it is conditioned in a way that is not quoted by Plaintiffs. The Nation denies the allegations in

Paragraph 54 to the extent they are inconsistent with the CWA and denies that Maine's theory of the case in this action is legally correct.

55. The allegations in Paragraph 55 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations and also denies that Maine's theory of the case in this action is legally correct.

56. The allegations in Paragraph 56 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that approved state water quality standards consist of designated uses of waters and criteria to protect the uses but denies that such criteria may only be numeric criteria and avers that water quality standards must also include anti-degradation requirements. The Nation denies the remainder of the allegations in Paragraph 56.

57. The allegations in Paragraph 57 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation admits that states (or EPA) must provide notice and hold a public hearing whenever promulgating a new or revised WQS. The Nation denies the remainder of the allegations in Paragraph 57 and the Nation denies that Maine's theory of the case in this action is legally correct.

58. The allegations in Paragraph 58 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation admits that States must submit new and revised WQS to EPA and that the CWA requires EPA to approve or disapprove the new or revised WQS within 60 and 90-day time

frames respectively, from the date of submission. The Nation denies that Maine's theory of the case in this action is legally correct.

59. The allegations in Paragraph 59 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the CWA requires EPA to notify the relevant State and specify the changes necessary to meet the requirements of the CWA when EPA disapproves a new or revised WQS after determining that it is not consistent with the applicable requirements of the CWA, and that the CWA provides for EPA to do so within 90 days of submission of the new or revised standard.

60. The allegations in Paragraph 60 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations in Paragraph 60 and the Nation denies that Maine's theory of the case in this action is legally correct.

61. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and therefore denies same.

62. The allegations in Paragraph 62 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that CWA section 518 was added to the CWA in the 1987 amendments. The Nation otherwise denies the allegations contained in Paragraph 62.

63. The allegations in Paragraph 63 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that eligible Indian tribes may be granted treatment in the same manner as state status under CWA section 518(e) for the purpose of establishing a water quality standards program

under the CWA and that section 518(e) was included in the 1987 CWA amendments. The Nation otherwise denies the allegations contained in Paragraph 63.

64. The allegations in Paragraph 64 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies those allegations.

65. The allegations in Paragraph 65 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language appears in the cited document but otherwise denies the allegations contained in Paragraph 65.

66. The allegations in Paragraph 66 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language appears in the cited document but otherwise denies the allegations contained in Paragraph 66.

67. The Nation is without knowledge or information sufficient to form a belief as to the truth of the allegation that no Maine Indian tribe has been authorized by EPA to issue NPDES permits, promulgate WQS, or administer a WQS program, and therefore denies same. The remainder of Paragraph 67 states a legal conclusion to which no response is required. To the extent that a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies those allegations.

68. The allegations in Paragraph 68 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that the quoted language appears in the sources cited in Paragraph 68 and denies the remainder of the allegations.

69. The allegations in Paragraph 69 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegation as stated and denies that Maine's theory of the case in this action is legally correct.

70. The allegations in Paragraph 70 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits the CWA requires states to protect fishing and recreation in or on water, but otherwise denies the allegations as vague.

71. The Nation is without knowledge or information sufficient to form a belief as to the truth of the allegation characterizing EPA's communications with Maine or the cited letters, which speak for themselves, and therefore denies same.

72. The Nation denies the allegations in Paragraph 72 and denies that Maine's theory of the case in this action is legally correct.

73. The Nation is without knowledge or information sufficient to form a belief as to the truth of the allegation characterizing Maine's 1999 submission of a set of WQS as being "complete and current" or characterizing the June 28, 1999 letter, which speaks for itself, and therefore denies same. The Nation denies that Maine's theory of the case in this action is legally correct.

74. The allegations in Paragraph 74 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies same.

75. The Nation is without knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore denies same.

76. The allegations in Paragraph 76 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation is without knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies same.

77. The allegations in Paragraph 77 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation is without knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies same.

78. The allegations in Paragraph 78 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits the selectively quoted excerpts in the parenthetical appear in the cited document, but denies the remainder of the allegations.

79. The allegations in Paragraph 79 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits selectively quoted excerpts in the parentheticals appear in the cited documents, but denies the remainder of the allegations.

80. The allegations in Paragraph 80 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation is without knowledge or information sufficient to form a belief as to the truth of the allegations and therefore denies same.

81. Paragraph 81 characterizes various EPA documents, which speak for themselves, and to the extent the allegations are inconsistent with the documents, the Nation denies them.

82. Paragraph 82 characterizes and quotes from EPA's 2000 Methodology, which speaks for itself, and to the extent the allegations are inconsistent with the document, the Nation denies.

83. Paragraph 83 characterizes and quotes from EPA's 2000 Methodology, which speaks for itself, and to the extent the allegations are inconsistent with the document, the Nation denies. The Nation denies that Maine's theory of the case in this action is legally correct.

84. The Nation admits that EPA issued the guidance referred to in Paragraph 84 in November 2000 and that the selectively quoted language appears in the guidance, but denies the remainder of the allegation as stated.

85. The Nation admits the selectively quoted language contained in Paragraph 85 appears in the referenced guidance, but denies the remainder of the allegations as stated.

86. The Nation admits that Plaintiffs have accurately quoted selective statements taken from EPA's 2000 guidance in Paragraph 86, but deny the allegations as stated and deny that Maine's theory of the case in this action is legally correct.

87. The Nation admits that the quoted language appears in the cited document but denies the allegation as stated and denies that Maine's theory of the case in this action is legally correct.

88. The Nation admits the allegations in Paragraph 88.

89. The Nation admits that the mathematical allegations in Paragraph 89 apply to a subset of the water quality criteria at issue in this case but denies that those allegations apply to all of the water quality criteria at issue in this case. The Nation otherwise denies the allegations in Paragraph 89 as stated and denies that Maine's theory of the case in this action is legally correct.

90. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and therefore denies same and further denies that Maine's theory of the case in this action is legally correct.

91. The Nation denies the allegations in Paragraph 91 as stated and denies that Maine's theory of the case in this action is legally correct.

92. The Nation denies the allegations in Paragraph 92 as stated and denies that Maine's theory of the case in this action is legally correct.

93. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and therefore denies same and further denies that Maine's theory of the case in this action is legally correct.

94. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and therefore denies same and further denies that Maine's theory of the case in this action is legally correct.

95. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and therefore denies same and further denies that Maine's theory of the case in this action is legally correct. The Nation admits that the selectively quoted language, with the exception of the bracketed material added by Maine, appears in the cited document.

96. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and therefore denies same and further denies that Maine's theory of the case in this action is legally correct. The Nation admits that the selectively quoted language in Paragraph 96 appears in the referenced sources but denies the remaining allegations in Paragraph 96 as stated.

97. The allegations in Paragraph 97 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation lacks knowledge or information sufficient to form a belief as to the truth of the

allegation, and therefore denies same and further denies that Maine's theory of the case in this action is legally correct.

98. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and therefore denies same and further denies that Maine's theory of the case in this action is legally correct.

99. The Nation denies the allegations in Paragraph 99 as stated.

100. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation, and therefore denies same and further denies that Maine's theory of the case in this action is legally correct. The Nation admits that the selectively quoted language appears in the cited document.

101. The Nation admits that EPA has renewed a NPDES Permit for discharges into the Penobscot River from the Nation's wastewater discharge facility at Indian Island. The allegation that this permit is "governed by Maine's WQS and superseded prior EPA-issued NPDES permits" states legal conclusions to which no response is required. The Tribe lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations of Paragraph 101, and therefore denies same and further denies that Maine's theory of the case in this action is legally correct.

102. The Nation admits that the selectively quoted language appears in the referenced permit, which speaks for itself, but denies the remaining allegations in Paragraph 102 as stated.

103. Paragraph 103 states a legal conclusion to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations as stated, and denies that Maine's theory of the case in this action is legally correct.

104. The Nation admits the allegations in Paragraph 104.

105. Paragraph 105 states a legal conclusion to which no response is required. To the extent a response to Plaintiff's legal argument may be deemed to be required, the Nation denies the allegations as stated.

106. Paragraph 106 states a legal conclusion to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits the quoted language in the allegations in Paragraph 106 can be found in the cited document and denies the allegation that EPA "rejected arguments that the 'Southern Tribes' had concurrent environmental regulatory jurisdiction with Maine over Maine's Indian Waters."

107. The allegations in Paragraph 107 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies the allegations, as worded by Plaintiffs, that the First Circuit in *Maine v. Johnson* "confirmed Maine's statewide environmental regulatory authority," because that statement is vague and overly broad. The Nation admits that the First Circuit held in *Maine v. Johnson* that Maine has jurisdiction to implement the CWA NPDES program in the Southern Tribes' territories.

108. The allegations in Paragraph 108 constitute legal conclusions to which no response is required. To the extent that a response to Plaintiffs' legal argument may be deemed to be required, the Nation admits that quoted language in the allegations appears on the pages of the decision cited by Maine but denies the allegations as stated and denies that Maine's theory of the case in this action is legally correct.

109. The Nation admits that the selectively quoted language appears in the cited document.

110. The Nation admits that the cited decision was issued in 2007 and that EPA acted on Maine's NPDES program application on March 28, 2012. The Nation further admits that EPA's

March 28, 2012 action on Maine's NPDES program application, which was published in the *Federal Register* on April 19, 2012, contains the language in the block quotes in Paragraph 110.

The Nation lacks knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations, and therefore denies same.

111. The Nation admits the allegations in Paragraph 111.

112. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation that the EPA initiated the referenced consultation without informing Maine, and therefore denies same. The Nation otherwise admits the allegations in Paragraph 112.

113. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation that the EPA wrote the referenced letter to the Nation without informing Maine, and therefore denies same. The letter attached as Exhibit 14 to the Second Amended Complaint speaks for itself, and the Nation admits the allegations that accurately quote from that letter.

114. The Nation denies the allegations in Paragraph 114 as vague. The Nation further lacks knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore denies same.

115. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation that the EPA did not inform Maine with respect to the Agreement, and therefore denies same. The letter attached as Exhibit 15 to the Second Amended Complaint speaks for itself, and the Nation admits the allegations that accurately quote from that letter.

116. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation that the EPA wrote to the Nation as indicated without informing Maine, and therefore denies same. The letter attached as Exhibit 14 to the Second Amended Complaint speaks for itself, and the Nation admits the allegations that accurately quote from that letter.

117. The Nation admits that it received a letter from EPA dated March 6, 2013, with the quoted language, but the Nation lacks knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations in Paragraph 117, and therefore denies same.

118. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations in Paragraph 118, and therefore denies same.

119. The allegations in Paragraph 119 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies those allegations as stated.

120. The Nation admits the allegations in Paragraph 120 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies those allegations as stated.

121. The Nation admits the allegations in Paragraph 121.

122. The Nation admits the allegations in Paragraph 122.

123. The Nation admits that it received a letter dated April 18, 2014, to all federally-recognized Indian tribes, including those in Maine, which, among other things, contains the language quoted in Paragraph 123.

124. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegation that Maine received a copy of the referenced EPA letter on any specific date and therefore denies that allegation. The Nation otherwise admits the allegation in Paragraph 124.

125. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 125, and therefore denies same.

126. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 126, and therefore denies same.

127. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 127, and therefore denies same.

128. The Nation admits the allegations in Paragraph 128.

129. The Nation admits that EPA's May 16, 2013, letter contains, among other things, the language quoted in Paragraph 129, except for the bracketed material.

130. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 130, and therefore denies same.

131. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 131, and therefore denies same.

132. The allegations in Paragraph 132 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal argument may be deemed to be required, the Nation denies those allegations.

133. Paragraph 133 characterizes various letters, which speak for themselves, and to the extent the allegations are inconsistent with the documents, the Nation denies.

134. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 134, and therefore denies same.

135. The Nation admits that EPA issued a February 2, 2015 letter, which letter acknowledges that there is on-going litigation concerning whether certain waters are within the boundaries of the Penobscot Reservation, that EPA's disapproval determinations for Indian territories applies only to those waters that are determined to be within Indian territories, and that EPA did not therein specifically identify every waterbody segment within Indian Waters in Maine. The Nation denies the other allegations in Paragraph 135.

136. The Nation denies the allegations in Paragraph 136 as vague, and further lacks knowledge or information sufficient to form a belief as to the remainder of the allegations, and therefore denies same.

137. The Nation is without knowledge or information sufficient to form a belief as to the truth of the allegation characterizing EPA's communications with Washington or the cited letters, which speak for themselves, and therefore denies same.

138. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 138, and therefore denies same. .

139. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 139, and therefore denies same.

140. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 140, and therefore denies same.

141. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 141, and therefore denies same.

142. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 142, and therefore denies same.

143. The Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 143, and therefore denies same.

144. The Nation repeats its responses to Paragraphs 1 through 143 and incorporates them herein by reference.

145. The allegations in Paragraph 145 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the

Nation denies those allegations as vague because Maine does not state in Paragraph 145 what specific actions it believes constitute final agency actions.

146. The allegations in Paragraph 146 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

147. The Nation repeats its responses to Paragraphs 1 through 146 and incorporates them herein by reference.

148. The allegations in Paragraph 148 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

149. The allegations in Paragraph 149 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

150. The allegations in Paragraph 150 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

151. The Nation repeats its responses to Paragraphs 1 through 150 and incorporates them herein by reference.

152. This claim has been dismissed, and therefore a response is not required. To the extent a response may be deemed to be required, the allegations in Paragraph 152 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

153. This claim has been dismissed, and therefore a response is not required. To the extent a response may be deemed to be required, the Nation lacks knowledge or information sufficient to form a belief as to the truth of the allegations, and therefore denies same.

154. This claim has been dismissed, and therefore a response is not required. To the extent a response may be deemed to be required, the allegations in Paragraph 154 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

155. This claim has been dismissed, and therefore a response is not required. To the extent a response may be deemed to be required, the allegations in Paragraph 155 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

156. This claim has been dismissed, and therefore a response is not required. To the extent a response may be deemed to be required, the allegations in Paragraph 156 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

157. This claim has been dismissed, and therefore a response is not required. To the extent a response may be deemed to be required, the allegations in Paragraph 157 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

158. This claim has been dismissed, and therefore a response is not required. To the extent a response may be deemed to be required, the allegations in Paragraph 158 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

159. This claim has been dismissed, and therefore a response is not required. To the extent a response may be deemed to be required, the allegations in Paragraph 159 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

160. This claim has been dismissed, and therefore a response is not required. To the extent a response may be deemed to be required, the allegations in Paragraph 160 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

161. This claim has been dismissed, and therefore a response is not required. To the extent a response may be deemed to be required, the allegations in Paragraph 161 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

162. This claim has been dismissed, and therefore a response is not required. To the extent a response may be deemed to be required, the allegations in Paragraph 162 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

163. This claim has been dismissed, and therefore a response is not required. To the extent a response may be deemed to be required, the allegations in Paragraph 163 constitute legal conclusions to which no response is required. To the extent a response to Plaintiffs' legal arguments may be deemed to be required, the Nation denies those allegations.

164. This claim has been dismissed, and therefore a response is not required. To the extent a response may be deemed to be required, the allegations in Paragraph 164 characterize relief

Plaintiffs seek to which no response is required. To the extent a further response may be deemed to be required, the Nation denies those allegations.

**GENERAL
DENIAL**

To the extent any allegation of the Plaintiffs' Second Amended Complaint has not been expressly and specifically admitted, the Nation denies such allegation.

REQUEST FOR RELIEF

The remainder of Plaintiffs' Second Amended Complaint states their Prayer for Relief to which no response is required. To the extent any response is required, the Nation denies that Plaintiffs are entitled to any of the requested relief.

DEFENSES

- A. Plaintiffs' 164-paragraph Second Amended Complaint violates the requirement of Fed. R. Civ. 8(a)(2) that a pleading should contain a short and plain statement of the Plaintiffs' claims, especially considering that this is an Administrative Procedure Act case where judicial review is on EPA's Administrative Record. The complaint is also improperly argumentative and should not be considered by the Court for any reason with respect to the merits of any claims for these reasons.
- B. The Court lacks subject matter jurisdiction over Plaintiffs' Administrative Procedure Act claims to the extent Plaintiffs challenge anything that does not constitute a final agency action.
- C. Plaintiffs' claims should be dismissed to the extent Plaintiffs bring claims that are not ripe for judicial review.

D. Plaintiffs' Administrative Procedure Act claims may only be reviewed on EPA's Administrative Record, and the Court should not consider any statements in the Pleadings, whether they be allegations or responses to allegations, on the merits of those claims, nor should it consider on the merits any document attached to Maine's Second Amended Complaint (or existing elsewhere in the docket) that is not contained within the Administrative Record.

E. The Court lacks subject matter jurisdiction over Plaintiffs' CWA citizen suit claims, which accordingly have been dismissed.

F. Certain of Plaintiffs' CWA citizen suit claims would be barred by the applicable six-year statute of limitations even if the Court had not dismissed those claims for lack of subject matter jurisdiction.

G. The Declaratory Judgement Act does not constitute a waiver of sovereign immunity from suit nor does it provide an independent basis for subject matter jurisdiction in this Court.

H. Plaintiffs' claims should be dismissed to the extent they are moot.

I. Plaintiffs' claims should be dismissed to the extent that Plaintiffs seek an advisory opinion from this Court.

J. The Second Amended Complaint fails to state claims for which relief can be granted.

K. Judgment should be entered in Defendants' favor on the pleadings.

L. An award of costs and fees against Defendants is inappropriate.

WHEREFORE, having answered Plaintiffs' complaint and having set forth affirmative defenses, the Nation prays that Plaintiffs' claims will be dismissed with prejudice, that no declaratory or injunctive relief be entered in Plaintiffs' favor with respect to those claims that are within the Court's subject matter jurisdiction and that are ripe for review at this time, and that the

Nation be allowed its costs, reasonable attorney fees, and any other relief the Court deems just and proper.

COUNTERCLAIM FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This counterclaim seeks mirror-image declaratory relief against the Plaintiffs/Counterclaim Defendants, Maine and Paul Mercer, Commissioner of Maine's Department of Environmental Protection, in his official capacity (collectively "Counterclaim Defendants"), together with injunctive relief as necessary to secure a proper remedy, regarding the same portions of the Settlement Acts raised in Count II of Maine's Second Amended Complaint (ECF 30) for a Declaratory Judgment ("Maine's Count II").

2. This counterclaim arises out of the same nucleus of operative facts and the same transactions or occurrences that give rise to Maine's Count II.

Jurisdiction and Venue

3. This Court has jurisdiction over this mirror-image counterclaim pursuant to 28 U.S.C. §§ 1331 (federal questions), 1362 (Indian tribes), for it arises under the Constitution, laws, or treaties of the United States and is brought by a federally recognized Indian tribe, with a governing body duly recognized by the United States Secretary of Interior.

4. Venue is proper in this Court pursuant to 5 U.S.C. § 1391.

The Parties

5. Plaintiff/Counterclaim Defendant State of Maine is a sovereign state, which has waived its Eleventh Amendment immunity to this Counterclaim by invoking the jurisdiction of this Court in this action.

6. Plaintiff/Counterclaim Defendant Paul Mercer is the Commissioner of Maine's Department of Environmental Protection, who is subject to suit in this Court in his official

capacity for the declaratory and injunctive relief sought in this Counterclaim and who has otherwise waived any Eleventh Amendment immunity to this Counterclaim by invoking the jurisdiction of this Court in this action.

7. Defendant/Counterclaim Plaintiff Penobscot Nation (the “Nation” or the “Tribe”) is a federally recognized Indian Tribe with a government duly recognized by the Secretary of the United States Department of the Interior.

Background

The Penobscot People, Their Aboriginal Territory, And Their Sustenance Practices

8. In 1980, upon settling massive land claims brought by the United States in this Court as trustee for the Penobscot Nation against Maine for obtaining land cessions from the Tribe and interfering with the Tribe’s fishing rights in violation of federal law, Congress declared, through its identical final House and Senate committee reports on the settlement, that the aboriginal territory of the Penobscot Nation is centered on the Penobscot River and that the Tribe is riverine in its land-ownership orientation.

9. Pursuant the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721 *et. seq.* (“MICA”), Congress ratified and rendered effective Maine’s Act to Implement the Indian Land Claims Settlement, 30 M.R.S.A. §§ 6201 *et. seq.* (“MIA”) and confirmed, in pertinent part, the right of Penobscot tribal members take fish “for their individual sustenance,” within the Tribe’s reservation. 30 M.R.S.A. § 6207(4), *ratified by* 25 U.S.C. § 1721(b).

10. The Tribe’s reservation, what was left after the suspect land cessions described in paragraph 8, encompasses the so-called Main Stem of the Penobscot River, from Indian Island, near Old Town, Maine to the confluence of the West and East Branches of the Penobscot River near Medway, Maine (hereinafter, the “Main Stem”).

11. The Penobscots have relied upon the resources of the Main Stem for their physical and cultural survival from time immemorial; their sustenance practices in the Main Stem are their cultural practices.

12. The fish and other animals upon which Penobscot tribal members rely for their sustenance in the Main Stem are in the waters of the Penobscot River; there are no waters on the surfaces of the islands to support fish, eel, and other Penobscot sustenance resources.

13. The Tribe's river-based subsistence fishing practices are imbedded in the Tribe's language, culture, traditions, and belief-systems, including its creation legends.

14. Penobscot family names, *ntútem* (or "totems" in English), reflect the fish in the River: for example, *Neptune* (eel); *Sockalexis* (sturgeon), *Penewit* (yellow perch).

15. The Tribe's principal island village variously called *Panawamskeag* or *Pem ta guaiusk took*, translated as "great or long River," but known by non-Indians as "Indian Old Town" or "Indian Island," is located just above a series of ledges and falls, historically the Tribe's most prized fishing site.

16. The Penobscots' riverine-based culture and subsistence economy are not romantic notions of the distant past, but remain fundamental to who the Penobscot People are.

17. Well into the 1990s, until education about contamination began to suppress their consumption of food sources from the River, Penobscot families ate fish, eel, and other animals from the River for up to four meals per week to the tune of two to three pounds per meal.

Penobscot Treaties Ceding Lands On Either Side Of The Penobscot River

18. On the eve of the Revolutionary War in 1775, the Provincial Congress in Boston resolved to protect the Tribe's aboriginal territory beginning at the head of the tide of the

Penobscot River, which is near Eddington, Maine, and extending six miles on each side of the River in exchange for the Tribe's pledge to support the Americans' war effort.

19. Despite requests from the Tribe, the federal government did not protect it after the Revolutionary War, and the Nation lost the bulk of its aboriginal territory in treaties with Massachusetts consummated in 1796 and 1818.

20. In the 1796 treaty, the Penobscot Nation ceded its aboriginal title to lands on both sides of the Penobscot River from the head of the tides at so-called Nichol's rock, near Eddington, Maine, and extending up the River thirty miles.

21. Nichol's rock, identified by the Penobscots as *Sobscook* (translated "Sea Rock") marks the place below which the Penobscot River is affected by the ebb and flood of the tides.

22. In the 1818 treaty, the Nation ceded the rest of its lands on both sides of the River from above the thirty-mile stretch ceded in the 1796 treaty, with the exception of four townships abutting the River, which Maine later claimed to secure by deed.

23. In 1820, at the advent of Maine's statehood upon separation from Massachusetts, Maine entered into a treaty with the Penobscot Nation to accede to the Tribe's 1818 treaty cessions to Massachusetts.

24. The Penobscots' relinquishment of the uplands on both sides of the Penobscot River in the above-referenced treaties did not change their subsistence way of life on the Penobscot River; their use and occupation of the River to survive was retained, never ceded by the plain terms of the treaties, and the Penobscots would not have entered into the treaties if they provided otherwise.

25. Long before, at the time of, and long after these treaties, up to the time of the Maine Indian Claims Settlement Act and in the decades thereafter the Penobscot people have

looked to, and relied upon, their retained right to sustain themselves and their culture by taking fish for sustenance from the waters of the Penobscot River surrounding and between their island communities on the Main Stem; for this is the Penobscot way of life.

The Nation's Land Claims, The Land Claims Settlement, And The Codification Of The Tribe's Retained Aboriginal Sustenance Fishing Right

26. Pursuant to an order issued by Judge Edward T. Gignoux in *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 388 F. Supp. 649 (D. Me. 1975), *aff'd*, 528 F.2d 370 (1st Cir. 1975), the United States, as trustee for the Penobscot Nation, commenced *United States v. Maine*, Civil No. 1969-ND (D. Me.) to challenge the validity of the Tribe's land cessions in its treaties with Massachusetts and Maine for want of federal approval under the Indian Nonintercourse Act.

27. One of the first laws enacted by the newly formed Congress of the United States in 1790, the Indian Nonintercourse Act, provided that Indian land cessions without the approval of the federal government were void.

28. The Penobscot Nation's 1796 and 1818 treaties with Massachusetts and its 1820 treaty with Maine were not approved by the federal government in accord with the Indian Nonintercourse Act, nor was the deed Maine claimed to secure from the Tribe for its cessions of the four townships described in paragraph 22.

29. Two decisions in 1979, *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061 (1st Cir. 1979) (Coffin, C. J.) and *State v. Dana*, 404 A.2d 551 (Me. 1979) (Wernick, J.), confirmed the application of federal Indian common law to the existing reservations of the Penobscot Nation and Passamaquoddy Tribe (their remaining territories after the suspect treaties and deed described in paragraphs 20-24) and drove Maine to reevaluate the desirability of settlement.

30. In its final committee reports on MISCA, Congress explained that *Bottomly* and *Dana* established that (a) the Tribe's existing reservation constituted "Indian country" as that term is used in federal law, (b) the Tribe was entitled to protection under federal Indian common law doctrines, and (c) the Tribe possessed inherent sovereignty to the same extent as other tribes in the United States.

31. In 1980, the Penobscot Nation, the Passamaquoddy Tribe, and the United States, as trustee for the tribes, agreed to settle *United States v. Maine*.

32. This tripartite settlement agreement has three parts: (1) the tribes and Maine reached an agreement on jurisdictional allocations with respect to the tribes, their lands, and their resources, (2) the Maine enacted MIA to implement that agreement, effective only upon approval by Congress and (3) pursuant to MISCA, Congress ratified MIA, and, *inter alia*, set out the terms for the tribes to recover lands and for the dismissal of *United States v. Maine*.

33. The agreement between the Nation and Maine to be implemented through MIA could not take effect without the consent and ratification of Congress in its role as trustee for the Penobscot Nation in *United States v. Maine* and because Congress possesses plenary authority over Indian affairs by the terms of the United States Constitution. Thus, the construction of MIA and MISCA (the "Settlement Acts") present questions of federal law.

34. Although Congress ended formal treaty making with Indian tribes in 1871, the Settlement Acts are subject to the same interpretive principles as those governing bilateral treaties.

35. In accord with those principles, what an Indian tribe does not expressly relinquish by valid treaty or other agreement is reserved.

36. In the treaties and agreements described in paragraphs 20-24, and the Penobscot Nation never relinquished its use and occupation of the Main Stem of the Penobscot River for sustenance fishing and other sustenance practices.

37. The Penobscot Nation's reserved sustenance fishing rights in the Main Stem received particular attention in the settlement of the land claims.

38. Maine provided no monetary consideration for the settlement, but characterized, as worthy consideration, a concession that the Tribe's retained authority to exercise sustenance fishing was secured under principles of federal Indian law.

39. Penobscot tribal member, Lorraine Dana, a single mother, who fed her family with fish caught from the waters of the Main Stem by her son, Penobscot tribal member, Barry Dana, testified at the Senate hearings on the Settlement Acts.

40. Under the mistaken belief that Maine would be granted full authority over Penobscot fishing rights, she expressed concern that her son, Barry, might not be able to take fish from the waters of the Main Stem in the quantity needed to feed her family of five.

41. Congress responded by addressing the Tribe's reservation sustenance fishing rights as a "Special Issue" in its final committee reports on the Settlement Acts, explaining that the settlement confirmed the Nation's reservation sustenance fishing rights as "expressly retained sovereign activities" and protected them under the First Circuit's decision in *Bottomly v. Passamaquoddy Tribe*, which Congress characterized as "holding that the Maine Tribes are entitled to protection under federal Indian common law doctrines."

42. Congress, through its committee reports, further promised under the "Special Issues" heading, that "[n]othing in the settlement provides for acculturation"; rather the

settlement “offers protection against” any disturbance of the Tribe’s “cultural integrity” by confirming tribal self-governance.

43. Congress then ratified the sustenance fishing provision set out in MIA, and quoted in paragraph 9.

44. At the time of the Settlement Acts and thereafter, Penobscot tribal members continued to rely upon the waters and bed of the Penobscot River from the Tribe’s principal reservation community at Indian Island, northward, including the Main Stem, to fish, hunt, and trap for sustenance.

45. The Tribe has also promulgated regulations governing those activities including related ceremonial taking of Atlantic salmon.

46. The United States, as trustee for the Penobscot Nation, has regularly acted on the Tribe’s behalf, to protect its sustenance resources in the Main Stem of the Penobscot River, including the filing of a natural resources damages claim against Lincoln Pulp & Paper for the Tribe’s loss of its sustenance fishing right and cultural use due to dioxin contamination of the Main Stem.

Maine’s Hostility To Recognition That The Nation’s Reservation Sustenance Fishing Right Carries With It An Attendant Right To Water Quality

47. In the decades following the Settlement Acts, Maine and entities discharging pollutants into the Main Stem have clashed with Penobscot Nation and the United States Department of the Interior about the nature of the Penobscot Nation’s sustenance fishing right and the protections to which it is entitled.

48. For example, in 1997, in the context of an application by a kraft paper mill, Lincoln Pulp & Paper, to the EPA for a pollutant discharge permit into the Main Stem near

Lincoln, Maine, Maine asserted to EPA that the Nation's sustenance fishing right afforded tribal members nothing more than the opportunity to catch "whatever fish were available" and did not afford the Nation any right to a quality or quantity of fish to nourish tribal members in accord with principles of federal Indian law.

49. Maine further asserted that there was no federal trust responsibility on the part of the EPA to protect the Nation's sustenance fishing right in any manner.

50. The United States Department of the Interior ("DOI") responded by explaining to EPA that under established principles of federal Indian law, EPA has a trust responsibility to protect the lands and resources of the Penobscot Nation, including water quality to render its reservation sustenance fishing right meaningful, including consideration of protections beyond the minimum requirements of the Clean Water Act.

51. DOI further clarified that the Settlement Acts, like treaties, constitute the supreme law of land and create rights and liabilities, which are virtually identical to those established by treaties.

52. Maine continues to hold to the position that the Nation's reservation sustenance fishing right confirmed by the Settlement Acts does nothing more than afford tribal members with the opportunity to catch whatever fish might be available and carries no attendant right to water quality. As such, in the promulgation, implementation, and enforcement of water quality standards in the Main Stem, Maine refuses to recognize that the Nation has any right to water quality to protect its sustenance fishing right as a unique treaty right under principles of federal Indian law.

The Current Controversy

53. In January 2015, DOI issued a formal opinion to EPA in the context of Maine's request that EPA approve its water quality standards for application in the Main Stem.

54. In that opinion, DOI, in its capacity as the agency in charge of administering MICA, wrote: "Fundamental, long-standing tenets of federal Indian law support the interpretation of tribal fishing rights to include the right to sufficient water quality to effectuate the fishing right. . . . The [federal] trust relationship counsels protection of tribal fishing rights in Maine.

55. In early 2015, guided by DOI's 2015 opinion, the EPA disapproved certain of Maine's water quality standards ("WQS") because they did not adequately protect the ability of Penobscots and other tribes to take fish from tribal waters, including the Main Stem, for sustenance.

56. Rather than revise its WQS to protect those rights in accord with EPA's decision, Maine instead amended its complaint in this action to challenge EPA's disapprovals, claiming, amongst other things that the Nation's sustenance fishing right "does not provide for any kind of special or expanded tribal right to any particular quantity or quality of fish or heightened level of underlying water quality."

57. In April 2018, DOI reaffirmed its formal opinion described in paragraphs 53 and 54, writing to EPA "that to be rendered meaningful" the Penobscot Nation's reservation sustenance fishing rights "by necessity" include "subsidiary rights to water quality."

58. In the wake of Donald Trump's inauguration, Maine embarked on efforts to undo the work of the Obama Administration in protecting the water quality of the Penobscot Nation's reservation sustenance fishery and the fishing rights of other Maine tribes.

59. In February 2017, Maine petitioned then EPA Administrator Scott Pruitt to reconsider and reverse the decisions described in paragraph 55.

60. That effort proved unsuccessful and on December 8, 2017, EPA reported to this Court that “[a]fter careful consideration” of Maine petition, it decided “not to withdraw or otherwise change any of the decisions that are challenged in this case.”

Counterclaim for Declaratory And Injunctive Relief

61. Counterclaim Plaintiffs reallege the allegations contained in paragraphs 1-60 of this Counterclaim as if fully set forth herein.

62. An actual controversy within the Court’s jurisdiction exists between the Penobscot Nation and the Counterclaim Defendants regarding the following: 1) whether the purposes of the Settlement Acts include to preserve and establish a land base from which the Penobscot Nation can practice its unique culture, including tribal sustenance living practices and fishing rights, free from water pollution that would frustrate those purposes; 2) whether the Main Stem of the Penobscot River warrants different environmental regulatory treatment from other Maine waters in recognition of the rights of the members of the Penobscot Nation to be free from pollution that would frustrate its unique culture, including tribal sustenance living practices and fishing rights; 3) the meaning of the portions of the Settlement Acts codifying the reserved sovereign aboriginal right of members of the Penobscot Nation to take fish for sustenance within the Main Stem of the Penobscot River and whether such rights include a right to be free of water pollution in the Main Stem of the Penobscot River that would frustrate that right;

63. Declarations by the Court of the rights and legal relations of the parties, with preliminary and permanent injunctive relief as necessary, will redress the existing actual controversies between the Nation and the Counterclaim Defendants, and the requested

declarations in favor of the Penobscot Nation, with preliminary and permanent injunctive relief as necessary, will redress the harms to the Nation.

64. The Counterclaim Defendants threaten to promulgate, implement and/or enforce WQS that fail to protect the unique retained sovereign fishing rights of the Penobscot Nation in the Main Stem as required by federal law.

Requests For Relief

Counterclaim Plaintiff requests from the Court the following relief:

- a. A declaration and order that the purposes of the Settlement Acts include to preserve and establish a land base from which the Penobscot Nation can practice its unique culture, including tribal sustenance living practices and fishing rights, free from water pollution that would frustrate those purposes;
- b. A declaration and order that the Main Stem of the Penobscot River warrants different environmental regulatory treatment from other Maine waters in recognition of the rights of the members of the Penobscot Nation to be free from pollution that would frustrate its unique culture, including tribal sustenance living practices and fishing rights;
- c. A declaration and order that the portions of the Settlement Acts codifying the reserved sovereign aboriginal right of members of the Penobscot Nation to take fish for sustenance within the Main Stem of the Penobscot River include a right to be free of water pollution in the Main Stem that would frustrate that right;
- d. A permanent injunction against the Counterclaim Defendants, as necessary to effectuate the foregoing declarations, to wit: to enjoin them from promulgating, implementing, and/or enforcing WQS in the Main Stem of the Penobscot River that fail to account for the rights requested to be declared herein;

e. An order awarding the Penobscot Nation its attorneys' fees and costs incurred in bringing and maintaining this action; and

f. Such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 29th day of July, 2018.

/s/ Kaighn Smith, Jr.

Kaighn Smith, Jr.

David M. Kallin

DRUMMOND WOODSUM 84 Marginal

Way, Suite 600 Portland, ME 04101

Telephone: (207) 772-1941 E-mail:

ksmith@dwmlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2018 I electronically filed this Answer and Counterclaim with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Kaighn Smith, Jr.

Kaighn Smith, Jr.

Drummond Woodsum
84 Marginal Way, Suite 600
Portland, Maine 04101
Tel: (207) 772-1941
ksmith@dwmlaw.com